IN THE

Supreme Court of the United States

OCTOBER TERM 1948

ROBERT McALLISTER,

Plaintiff-respondent below,

against

COSMOPOLITAN SHIPPING COMPANY, INC.,

Petitioner-appellant below.

BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae*

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BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae*

Preliminary Statement

The question presented to this Court is whether a seaman, who was employed on a ship, operated under the standard form of a General Agency Agreement between the United States War Shipping Administration and a privately owned Steamship Company, who was injured or became ill while so employed at a date subsequent to the effective date of the Clarification Act, has a cause of action, which he may pursue in a State or Federal Court at law, under the Jones Act against said Steamship Company.

The exact question which directly affects the rights of the respondent is—*whether a seaman or his representative may sue the General Agent under the Jones Act, and have a trial by jury.*

POINT I.

Public Law 17, 57 Stat. 45, 50, U. S. C. A. App. Section 1291, shows a continuing intent to permit a seaman at his election, to sue his employer, the operator of the steamship, at law, and have a jury determine the facts and assess damages if any.

The Jones Act was an amendment of Section 20 of the LaFollette Seamen's Act of March 4th, 1915, which read as follows:

> "Sec. 20. In any suit to recover damages for any injury, sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

In drawing the Bill in just that way, we relied upon the statement in paragraph numbered "3", page 175 of *the Osceola,* 189 U. S. 158, in which the Supreme Court stated (1903):

> "All members of the crew * * * are as between themselves, fellow-servants, and hence, seamen, cannot recover for injuries sustained through the negligence of another member of the crew * * *."

In 1918, when we filed a petition for certiorari, briefed and argued the *Chelentis* case, 247 U. S. 372, having relied upon the decision in *Quebec* v. *Merchant,* 133 U. S. 375 (1890), and the restatement in *The Osceola, supra.* We had fallen into the erroneous belief that the basis of liability of an employer at Common Law, had somehow or other been engrafted to effect liability under the Maritime Law.

A careful study of those cases and subsequent ones, indicates of course, that the shipowner never did owe any duty to the seaman (as Justice McReynolds stated in the

Chelentis case) except to furnish a seaworthy vessel and maintain the ship and her appliances in a seaworthy condition. The basis of this obligation of course, was contractual.

While we often, in pleadings and on motions, and in trials, referred to the common-law duty to furnish a reasonably safe place in which to work, strictly speaking, the shipowner had only a duty to give care and maintenance and to furnish a seaworthy vessel.

One of the reasons that Congress passed the LaFollette Seamen's Act was that they believed it would, by releasing the wages of seamen of foreign vessels, bring about *an equalization* of operating costs. Indeed it is estimated that foreign seamen did receive about three billion dollars a year in increased wages for the next fifteen years or so, after the Half-wage Law finally went into effect. *Dillon* v. *Strathearne*, 252 U. S. 348.

After the decision, adverse in the Chelentis case, from the seamen's point of view, and while passage of the Jones Act amendment was being urged, there was raised by able counsel for the shipowner in the case of *Berg* v. *Philadelphia and Reading Railway*, 266 Fed. 593 (Third Circuit, affirmed—274 Fed. 534), the *question* of whether or not there *had really been saved* to the seamen, in the creation of the admiralty jurisdiction under the Judiciary Act, Title 28, U. S. C. A.—Sec. 41, *the right to have a trial by jury.*

We *did* prevail upon Senator Wesley Jones then Chairman of the Committee on Commerce (U. S. Senate) to insert in the Jones Act, the following provision:

> "at his election maintain an action for damages at law, with the right of trial by jury."

This Court, in *Panama* v. *Johnson*, 264 U. S. 375, upheld the constitutionality of the Jones Act, on the ground that—

"the Congress is empowered by the constitutional provision, to alter, qualify or supplement the maritime rules * * * in relative conformity to the common rules or some modification of the latter, if the change be countrywide and uniform in operation."

And on page 389 of 264 U. S. 375, *Panama* v. *Johnson*, this court, stated:

"As originally enacted, Sec. 20 was part of an act, the declared purpose of which was 'to promote the welfare of American seamen.' It then provided that in suits to recover damages for personal injuries, 'seamen having command shall not be held to be fellow-servants with those under their authority', and in Chelentis v. Luckenbach S. S. Co., supra, page 384, this Court treated it as part of the Maritime Law, but held, it did not disclose a purpose 'to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea, as the common law prescribed for employers in respect of their employees on shore.'"

The Jones Act has been enforced in both State and Federal Courts ever since. The amendment to the *Railway Servants Act*, Sec. 8657, extending from two to three years the time in which suit can be brought in cases of personal injury or death, has permitted seamen who have been damaged by negligence in the navigation of vessels, to undertake negotiations to settle their claims for a period of more than two years, and then to bring suit if necessary, before the limitation on the cause of action expired.

This brief is filed on behalf of one such widow Mrs. Catherine M. Matthews, whose husband died as a result of exposure to sea-water in a Neptune Trial (equator crossing) which took place immediately after he left the en-

gine room where he had been caused to perspire freely in the performance of his work as chief engineer. He contracted a severe cold and pneumonia, and died without proper treatment six days later, November 28th, 1944, although the vessel was in convoy, and a skilled physician on a Cruiser in this convoy was available, and could have attended to him had the master, mate, or pharmacist's mate exercised that degree of care which was owed.

In 1932, this Court in *Cortes* v. *Bull*, 237 U. S. 367, in a learned opinion written by the late Justice Cardozo, held that a cause of action for neglect to treat, although arising under the ancient maritime law (*Rules of Oleron*, 30 Fed. cases; *Reed* v. *Canfield*, 20 Fed. cases 426—Case 11641), could be prosecuted at Common Law under the provisions of the Jones Act.

With the coming of the Second World War, Congress took action, as it had, prior to the First World War, to set up an agency, so that it would be possible to have operated for us, merchant vessels which were indispensable to the maintenance of our armed forces to move troops, and supply our allies and soldiers with needed food, and munitions.

All during the First World War, and up to 1928, merchant seamen were permitted to enforce their claims in the State or Federal Courts of this whole country, at common-law or in admiralty as they chose.

Congress had provided in the Seamen's Act that the courts of the United States should be opened to seamen without the prepayment of fees. This Court in *Ex Parte Abdu*, 247 U. S. 27, May 20th, 1918, held that the Act of June 12th, 1917, Chapter 27, 40 Stat. 157, intended by Congress to permit seamen to have free use of the courts without the prepayment of fees, did not include proceedings before the Appellate Courts. Congress acted almost immediately and amended the statute so as to include Appellate Courts.

Things for the seaman ran along very smoothly until January 6th, 1930. The lawyers for the government and the Emergency Fleet Corporation had permitted seamen to sue at common-law and recover substantial verdicts since the United States Emergency Fleet Corporation was incorporated 1915. But the United States Government prevailed upon the Supreme Court in *Johnson-Lustgarten*, 280 U. S. 320, to hold that the seamen's sole remedy under the Jones Act, the vessel being owned by the United States and operated by the Fleet Corporation, was a suit under the Suits in Admiralty Act. Thus they deprived the seaman of a trial by jury in case of accident aboard vessels operated by a government Agency.

In 1943 this Court in *Brady* v. *Roosevelt*, 317 U. S. 575, reversed the Lustgarten case and again permitted merchant seamen to maintain their actions at common-law with jury trials.

In March 1943, as a result of hearings on Bill H. R. 7424 in the House of Representatives, and another bill before the Committee on Commerce in the U. S. Senate, there was a compromise between the Committee of the House and Senate, of which the Clarification Act is the result.

Seamen were opposed to passage of any Compensation Act, which would be an exclusive remedy, and had consistently maintained through their representatives, that they should be permitted to sue at common-law or in admiralty for injuries sustained by them in the performance of their work, on any merchant vessels anywhere.

Seamen and their representatives, when the Clarification Act was passed, understood that the rights of seamen to have jury trials as stated in the Jones Act, were preserved.

Justice Sutherland (then ex-Senator) had insisted in 1920 that the language about a jury trial in the Jones Act

was unnecessary because of the terms of the "saving to suitors" clause of the Judiciary Act discussed in *Panama* v. *Johnson* (1924), at page 390 of U. S. Reports, Volume 264. Justice Sutherland did not sit in the *Panama* v. *Johnson* case, since he had been an adviser to the seamen on the wording of the Jones Act.

Nevertheless we insisted that in view of the argument in the *Berg* case, *supra*, we wanted *the right of a seaman to trial by jury* reaffirmed.

The Judicial Code of 1789, as restated in Title 28, U. S. C. A., Sec. 41, says that:

> "The District Courts shall have original jurisdiction as follows: (3) *Admiralty causes, seizures and Prizes.* Third—of all Civil Causes of Admiralty and Maritime Jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common-law is competent to give it",

Above "Saving to Suitors" clause now reads in Title 28 U. S. C. Dec. 1933, effective Sept. 1, 1948, as follows:

> "The District Court shall have jurisdiction, exclusive of the states, of (1) *Any Civil Case of Admiralty or Maritime Jurisdiction saving to the libellant or Petitioner in every case any other remedy to which he is otherwise entitled.*"

The Jones Act has been construed by this Court to be a part of the General Martime Law of the United States—*Panama* v. *Johnson*, 264 U. S. 375, and the *Clarification Act of March 24th, 1943*, Chapter 26, 57 Stat. 47, Sec. 1291, was passed, continuing the provision:

> "Claims arising under Clause 1 hereof, shall be enforced in the same manner as such claims would be

enforced if the seaman were employed in a privately owned American vessel."

At any rate, Mr. Elmer H. Groefsma, 2343 Buhl Building, Detroit, Michigan (attorney for Mrs. Matthews), had read as had many others, the decision of this Court of June 10th, 1946 in the Hust case. After scanning the Clarification Act he decided that he had three years in which to sue, if suit became necessary. The date of death of Mr. Matthews was November 28th, 1944, and suit was started June 18th, 1947.

This Court in reaching a decision in the Hust case, took into consideration the fact that seamen of the United States, had for years been engaged in collective bargaining with Companies and shipowners on the Pacific Coast, on the Atlantic Coast and Gulf and on the Great Lakes. These contracts had been renewed from time to time. The United States declared war on December 8th, 1941, and the United States Government, through the Maritime Commission, took control of our whole merchant fleet in order to direct the movements of our vessels. This action was necessary to win the war, we say it did not deprive the merchant seamen of their rights to pursue their remedies at law or in admiralty.

Merchant seamen were not conscripted. They continued as free citizens. They were not enlisted in civil service. They were not made the beneficiaries of any pensions. They were left as free citizens, and it was of course, provided that citizens employed in the Merchant Marine would not be subject to the draft.

The Clarification Act as we understood it at the time of its preparation and passage, was intended to provide that the seamen should continue to have all their then existing remedies.

It is true that the government of the United States through one of its departments, set up an elaborate system of contracts for the proper operation and control of its merchant vessels. It provided that the operator must set up a special fund, out of which his disbursements for the operation of vessels under his control must be paid. Art. 7—Last Paragraph.

Since the adoption of our Constitution, and prior thereto, it has been the practice for the master, as alter ego of the owner, to engage the seamen in agreements for voyages, under Articles of Agreement which more or less described the voyage to be undertaken.

While general rules were created for the control of all agents of the United States who were authorized to operate steam vessels, still the crews were hired in accordance with the terms of the existing bargaining agreements between owners and the Unions of which the men were members. The supplies of the vessels were purchased by the steamship operators and delivered aboard the vessels pursuant to their directions. The operators through their employees, paid the seamen their wages. The masters kept official logs; the officers of vessels kept deck-logs and engine-room logs, and they operated their vessels in the same manner that vessels had always been operated. These steamships, operated by agents of the United States, were subject to the same regulations as to whether they should sail, when they should sail, where they should sail to, and what they should load, and where and when it should be loaded just the same as owners of private vessels within the jurisdiction of the United States were controlled in war-time.

The keeping of seamen who have always loved freedom, free from military constraint and control, has made them, under the flag of the United States, impervious to the seductive and traitorous suggestions of those who would

overthrow the government of the United States by force and establish a dictatorship.

The government, these seamen have preserved, now seeks to deprive them of the right to a jury trial, guaranteed to them not only by the Judiciary Act, but by the restatement of that right in the Jones Act itself.

The transfer of American vessels to foreign flags for cheaper operation, may have inspired our government, or those who have been in charge of it for the last two years, to deprive the seamen of a jury trial by restoring the ruling of the discredited Johnson-Lustgarten decision.

The U. S. Circuit Court of Appeals in *Kryakos* v. *Goulandris*, 151 Fed. (2) 132, applied the Jones Act to an injured seaman on a foreign vessel, while it was engaged in competing trade with vessels of the United States, but the Court of Appeals of New York, November 24, 1948 in *Sonnesoin* v. *Panama*, 298 N. Y. 262, held that a seaman who became ill on a Panama flag vessel, owned by a resident Standard Oil subsidiary—the Panama Transport Co. must plead and prove the foreign law, even though it might be contrary to the Public Policy of the forum—*i.e.*, the equalization policy of the Seamen's Act of March 4, 1915, *Dillon* v. *Strathearn*, 252 U. S. 348.

The United States Circuit Court of Appeals in the Second Circuit—in McAllister case—has held, as has this court, that the agent was the *pro hac vice* owner of the vessel, and in the case of *Mulligan* v. *Eastern Steamship Lines, Inc.*, November 1948, stated:

> "We hold that the appellant as the operating agent of the vessel, is not immune from suit because of the provisions of the Clarification Act, supra, and do so

for the reason stated in our recent decision in McAllister v. Cosmopolitan Shipping Co.—Second Circuit 1948; A. M. C. 1307-169; Fed. (2) 4."

Confusion in the uniform enforcement of the Maritime Law of the United States discussed by this court in *Workmen* v. *New York City*, 179 U. S. 552, page 558, and *Southern Pacific* v. *Jensen*, 244 U. S. 205, *Chelentis* v. *Luckenbach*, *supra*, will be avoided, if it is decided that the Clarification Act contains no provision, the intent of which was to effect the seamen's right to a jury trial.

Conclusion

While the Clarification Act has certain permissive features in view of the legislative history of the seamen's right to "a Jury Trial" as reiterated in the Jones Act, we say that in the absence of an Act of Congress to take it away, the right of a seaman to a jury trial still exists.

Respectfully submitted,

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